CRIMINAL YEAR SEMINAR

April 14, 2017 - Tucson, Arizona
April 21, 2017 - Phoenix, Arizona
May 12, 2017 - Chandler, Arizona

2016 EVIDENCE UPDATE

Presented By:

The Honorable Crane McClennen
Judge of the Maricopa County Superior Court (Retired)
&
Jonathan Mosher
Deputy Pima County Attorney

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ARIZONA EVIDENCE REPORTER

JUDGE CRANE MCCLENNEN (RET.)

STATE V. INGRAM, 239 ARIZ. 228, 368 P.3D 936 (CT. APP. 2016).

OFFICER TESTIFIED PERSONNEL AT U.S. MARSHALS SERVICE SAID INGRAM WAS POSSIBLY ARMED WITH .40 CALIBER PISTOL; INGRAM CONTENDED THIS WAS HEARSAY.

- **RULE 103(A).** PRESERVING A CLAIM OF ERROR.
- **103.A.026** IN A CRIMINAL CASE, HEARSAY EVIDENCE ADMITTED WITHOUT OBJECTION BECOMES COMPETENT EVIDENCE FOR ALL PURPOSES UNLESS ITS ADMISSION AMOUNTS TO FUNDAMENTAL ERROR.

¶ 23 N.6 (ALTHOUGH THIS APPEARED TO BE HEARSAY, DEFENDANT OBJECTED ON BASIS OF "FOUNDATION" AND NOT "HEARSAY," AND THUS FAILED TO PRESERVE ISSUE FOR APPEAL).

STATE V. STEINLE (MORAN), 239 ARIZ. 415, 372 P.3D 939 (2016).

A WITNESS USED A CELL PHONE TO RECORD A FIGHT, THEN CROPPED THE FIRST 4½ MINUTES OF THE RECORDING AND SAVED THE REMAINING 31 SECONDS. MORAN CONTENDED THAT, BECAUSE THE FULL COPY WAS NOT AVAILABLE, THE TRIAL COURT SHOULD NOT ADMIT THE EDITED OR CROPPED VIDEO; TRIAL AGREED AND SO ORDERED.

- **RULE 106**. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS.
- **106.005.** A RECORDED STATEMENT MAY INCLUDE ELECTRONIC RECORDINGS, SUCH AS A CELL-PHONE VIDEO. ¶ 8.

MORAN CONTINUED

- **106.007**. RULE 106 IS A RULE OF INCLUSION, NOT A RULE OF EXCLUSION. ¶ 10.
- **106.010**. WHEN A PARTY INTRODUCES A PORTION OF A WRITING OR RECORDED STATEMENT, THE OTHER PARTY MAY REQUIRE THE INTRODUCTION OF ANY OTHER PORTION OR ANY OTHER WRITING OR RECORDED STATEMENT THAT IN FAIRNESS OUGHT TO BE CONSIDERED WITH THE PORTION ADMITTED, WHICH MEANS A PORTION OF A STATEMENT THAT IS NECESSARY TO QUALIFY, EXPLAIN, OR PLACE IN CONTEXT THE PORTION OF THE STATEMENT THAT IS ALREADY ADMITTED. ¶ 12.

(COURT HELD TRIAL COURT ERRED IN ORDERING THAT IT WOULD NOT ADMIT EDITED OR CROPPED VIDEO.)

MORAN CONTINUED

MORAN CONTENDED VIDEO CONTAINED MULTIPLE LEVELS OF HEARSAY, INCLUDING CONDUCT AND PEOPLE MAKING STATEMENTS HEARD ON VIDEO.

RULE 801(A) — HEARSAY — STATEMENT.

- **801.A.010** IF VERBAL OR NONVERBAL CONDUCT IS NOT INTENDED TO BE AN ASSERTION, BY DEFINITION IT IS NOT HEARSAY, EVEN IF IT IS OFFERED AS EVIDENCE OF THE DECLARANT'S IMPLICIT BELIEF OF A FACT.

¶¶ 21–22 (COURT NOTED CONDUCT ON VIDEO WAS NOT INTENDED AS AN ASSERTION, THUS VIDEO WAS NOT HEARSAY).

MORAN CONTINUED

- **RULE 803. HEARSAY EXCEPTIONS—REGARDLESS OF WHETHER DECLARANT IS AVAILABLE AS WITNESS.**
- **RULE 803(1). PRESENT SENSE IMPRESSIONS.**
- **803.1.010** A HEARSAY STATEMENT IS ADMISSIBLE AS A PRESENT SENSE IMPRESSION IF (1) THE DECLARANT PERCEIVED THE EVENT OR CONDITION, (2) THE STATEMENT DESCRIBED THE EVENT OR CONDITION, AND (3) THE DECLARANT MADE THE STATEMENT WHILE PERCEIVING THE EVENT OR CONDITION OR IMMEDIATELY THEREAFTER.
- **RULE 803(2). EXCITED UTTERANCES.**
- **803.2.010** THIS RULE HAS THREE REQUIREMENTS: (1) THERE MUST BE A STARTLING EVENT; (2) THE STATEMENT MUST RELATE TO THE STARTLING EVENT; AND (3) THE STATEMENT MUST BE MADE SOON ENOUGH AFTER THE EVENT SO THAT THE DECLARANT DOES NOT HAVE TIME TO FABRICATE.

¶¶ 21–23 (COURT NOTED THAT, TO EXTENT PERSONS COULD BE HEARD MAKING STATEMENTS, THOSE WOULD QUALIFY AS PRESENT SENSE IMPRESSIONS OR EXCITED UTTERANCES).

MORAN CONTINUED

MORAN CONTENDED THE STATE COULD NOT SHOW CHAIN OF CUSTODY FOR THE VIDEO.

- **RULE 901. AUTHENTICATING AND IDENTIFYING EVIDENCE.**
- **RULE 901(B)(1) TESTIMONY OF WITNESS WITH KNOWLEDGE.**
- **901.B.1.030** A PARTY MAY ESTABLISH THE CONDITION PRECEDENT FOR THE ADMISSION OF EVIDENCE EITHER BY CHAIN OF CUSTODY OR IDENTIFICATION TESTIMONY.

¶¶ 24–26 (COURT NOTED STATE COULD HAVE LIVE WITNESS TESTIFY WHETHER CONTENTS OF VIDEO FAIRLY AND ACCURATELY DEPICTED EVENTS PERCEIVED BY WITNESS, THUS CHAIN-OF-CUSTODY TESTIMONY NOT NECESSARY).

MORAN CONTINUED

MORAN CONTENDED THE STATE WAS REQUIRED TO HAVE THE ORIGINAL OF THE VIDEO.

- **RULE 1002. REQUIREMENT OF THE ORIGINAL.**
- **1002.010** THE RULE REQUIRING PRODUCTION OF THE ORIGINAL APPLIES ONLY WHEN A PARTY SEEKS TO PROVE THE CONTENTS OF A WRITING, RECORDING, OR PHOTOGRAPH WITHOUT PRODUCING THE WRITING, RECORDING, OR PHOTOGRAPH ITSELF.
- **1002.020** THE RULE DOES NOT REQUIRE THE PRODUCTION OF AN ORIGINAL WRITING, RECORDING, OR PHOTOGRAPH TO PROVE AN EVENT THAT EXISTED INDEPENDENTLY OF ITS DESCRIPTION IN SUCH WRITING, RECORDING, OR PHOTOGRAPH.

¶¶ 18–20 (COURT NOTED THE STATE WAS NOT SEEKING TO PROVE THE CONTENTS OF THE VIDEO, AND WAS INSTEAD INTENDING TO USE VIDEO TO ILLUSTRATE LIVE TESTIMONY FROM WITNESS, THUS RULE 1002 DID NOT APPLY).

STATE V. GOUDEAU, 239 ARIZ. 421, 372 P.3D 945 (2016).

GOUDEAU CONTENDED THE TRIAL COURT ERRED IN ADMITTING THE AUTOPSY PHOTOGRAPH.

- **RULE 401. DEFINITION OF "RELEVANT EVIDENCE."**
- **401.CR.010 & .020** FOR EVIDENCE TO BE RELEVANT, IT MUST SATISFY TWO REQUIREMENTS: **FIRST,** THE FACT TO WHICH THE EVIDENCE RELATES MUST BE OF CONSEQUENCE TO THE DETERMINATION OF THE ACTION (MATERIALITY); AND **SECOND,** THE EVIDENCE MUST MAKE THE FACT THAT IS OF CONSEQUENCE MORE OR LESS PROBABLE (RELEVANCE).
- **401.CR.350** A PHOTOGRAPH IS ADMISSIBLE IF RELEVANT TO AN EXPRESSLY OR IMPLIEDLY CONTESTED ISSUE.

GOUDEAU CONTINUED

- **RULE 403. PROBATIVE VALUE/PREJUDICIAL EFFECT.**
- **403.CR.115** IF A PHOTOGRAPH HAS LITTLE BEARING ON ANY EXPRESSLY OR IMPLIEDLY CONTESTED ISSUE, OR IF A PHOTOGRAPH IS MERELY DUPLICATIVE TO OTHER PHOTOGRAPHS, ITS RELEVANCE MAY BE LIMITED, AND THUS IF THAT PHOTOGRAPH IS PREJUDICIAL, ITS PROBATIVE VALUE MAY BE SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

¶¶ 150–58 (2016) (COURT HELD PHOTOGRAPH WAS RELEVANT BECAUSE "THE FACT AND CAUSE OF DEATH ARE ALWAYS RELEVANT IN A MURDER PROSECUTION"; HELD IT ALSO HELPED TO CORROBORATE THE MEDICAL EXAMINER'S EXPLANATION OF THE VICTIM'S INJURIES; REJECTED GOUDEAU'S CONTENTION THAT THE STATE COULD HAVE USED OTHER EVIDENCE TO EXPLAIN WHAT THE PHOTOGRAPH DEPICTED; AND HELD THE PHOTOGRAPH WAS NOT NEEDLESS CUMULATIVE BECAUSE IT WAS THE ONLY ONE THAT ILLUSTRATED THE POSITION OF SHOOTER).

GOUDEAU CONTINUED

GOUDEAU CONTENDED THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE OF INJURIES THE VICTIM SUSTAINED SEVERAL DAYS BEFORE SHE WAS KILLED

- **401.CR.120** FOR EVIDENCE OF THIRD-PARTY CULPABILITY TO BE RELEVANT, IT MUST TEND TO CREATE A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT; IF EVIDENCE SHOWS THAT ANOTHER PERSON HAD THE MOTIVE AND OPPORTUNITY TO COMMIT THE CRIME, THIS WOULD TEND TO CREATE A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT, WHICH WOULD MAKE THE EVIDENCE RELEVANT AND THE TRIAL COURT SHOULD ADMIT IT.

¶¶ 159–67 (COURT HELD THE TRIAL COURT COULD HAVE REASONABLY FOUND THAT THE EVIDENCE DID NOT CREATE A REASONABLE DOUBT ABOUT GOUDEAU'S GUILT).

GOUDEAU CONTINUED

GOUDEAU CONTENDED THE TRIAL COURT ERRED BY DENYING HIS MOTION TO SEVER AND BY PERMITTING JOINDER OF 82 COUNTS CHARGING 74 FELONIES.

- **RULE 404(B). OTHER CRIMES, WRONGS, OR ACTS.**
- **404.B.CR.220** IN DETERMINING WHETHER THE EXTRINSIC EVIDENCE OF ANOTHER CRIME, WRONG, OR ACT IS RELEVANT TO SHOW *MODUS OPERANDI* AND THUS TO PROVE IDENTITY, THE TRIAL COURT SHOULD DETERMINE WHETHER THERE ARE SIMILARITIES WHERE NORMALLY THERE WOULD BE EXPECTED TO BE DIFFERENCES.

¶¶ 54–67 (COURT NOTED SAME GUN WAS USED IN SEVERAL OF THE FELONIES AND THAT DNA LINKED GOUDEAU TO SEVERAL OF THE FELONIES, MOREOVER, DEFENDANT'S *MODUS OPERANDI* WAS SIMILAR IN VARIOUS WAYS ACROSS THE VARIOUS CRIMES; FURTHER, TRIAL COURT CONSIDERED FACTUAL DIFFERENCES AMONG THE CRIMES; TRIAL COURT THUS DID NOT ERR IN JOINDER).

GOUDEAU CONTINUED

GOUDEAU CONTENDED THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT HE HAD BEEN PREVIOUSLY CONVICTED OF KIDNAPPING, SEXUAL ASSAULT, SEXUAL ABUSE, AND AGGRAVATED ASSAULT ON TWO SISTERS.

¶¶ 96–102 (COURT NOTED GOUDEAU CONCEDED HIS CONVICTIONS ESTABLISHED OTHER ACTS AND THAT THEY WERE RELEVANT, BUT CONTENDED THEY WERE NOT SUFFICIENTLY SIMILAR TO CRIMES CHARGED IN THIS CASE; COURT HELD THEY WERE SUFFICIENTLY SIMILAR TO ESTABLISH IDENTITY)

GOUDEAU CONTINUED

- **404.B.CR.500** EVIDENCE OF ANOTHER CRIME, WRONG, OR ACT IS ADMISSIBLE IF IT IS FACTUALLY OR CONDITIONALLY RELEVANT, WHICH MEANS THE PROPONENT IS ABLE TO PRODUCE SUFFICIENT EVIDENCE FROM WHICH THE TRIER-OF-FACT COULD CONCLUDE, BY CLEAR AND CONVINCING EVIDENCE, THAT THE OTHER ACT HAPPENED, THE PERSON COMMITTED THE ACT, AND THE CIRCUMSTANCES OF THAT ACT WERE AS THE PROPONENT CLAIMS; PROOF BEYOND A REASONABLE DOUBT IS NOT NECESSARY.

¶ 99 (COURT NOTED THE STATE PRESENTED MUCH OF THE SAME EVIDENCE THAT WAS PRESENTED AT THE PRIOR TRIAL).

GOUDEAU CONTINUED

GOUDEAU CONTENDED THE TRIAL COURT ABUSED DISCRETION IN ALLOWING SEPARATE OPENING STATEMENTS BEFORE EACH OF 13 "CHAPTERS" OF CHARGED CONDUCT.

- **RULE 611(A). MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE — CONTROL BY THE COURT.**
- **611.A.020** A TRIAL COURT HAS DISCRETION TO DETERMINE THE MANNER OF THE PROCEEDINGS, THE MANNER OF QUESTIONING, AND THE ORDER OF PRESENTATION OF EVIDENCE.

¶¶ 86–95 (2016) (COURT NOTED GOUDEAU WAS CHARGED IN 82 COUNTS WITH COMMITTING 74 VARIOUS FELONIES, AND HELD TRIAL COURT DID NOT ABUSE DISCRETION IN ALLOWING SEPARATE OPENING STATEMENTS).

STATE V. FOSHAY, 239 ARIZ. 271, 370 P.3D 618 (CT. APP. 2016).

FOSHAY NOTED THE AUTOPSY TOXICOLOGY REPORT INDICATED THE PRESENCE OF METHAMPHETAMINE IN THE VICTIM AND THAT THE VICTIM HAD BEEN PREVIOUSLY INVOLVED IN DRUG SALES 2 YEARS PRIOR, AND CONTENDED THIS SHOWED SOMEONE ELSE MIGHT HAVE HAD THE MOTIVE TO KILL THE VICTIM.

- **RULE 401. DEFINITION OF "RELEVANT EVIDENCE."**
- **401.CR.020** FOR EVIDENCE TO BE RELEVANT, IT MUST MAKE THE FACT THAT IS OF CONSEQUENCE MORE OR LESS PROBABLE (RELEVANCE).
- **401.CR.120** FOR EVIDENCE OF THIRD-PARTY CULPABILITY TO BE RELEVANT, IT MUST TEND TO CREATE A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT; IF EVIDENCE SHOWS THAT ANOTHER PERSON HAD THE MOTIVE AND OPPORTUNITY TO COMMIT THE CRIME, THIS WOULD TEND TO CREATE A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT, WHICH WOULD MAKE THE EVIDENCE RELEVANT AND THE TRIAL COURT SHOULD ADMIT IT.

FOSHAY CONTINUED

- **RULE 403**. PROBATIVE VALUE/PREJUDICIAL EFFECT.
- **403.CR.010** IF EVIDENCE IS RELEVANT AND THEREFORE ADMISSIBLE, A TRIAL COURT MAY NOT EXCLUDE THAT EVIDENCE UNLESS THE OPPOSING PARTY ESTABLISHES THAT THE EVIDENCE POSES THE DANGER OF UNFAIR PREJUDICE, AND ESTABLISHES THAT THE UNFAIR PREJUDICE SUBSTANTIALLY OUTWEIGHS THE PROBATIVE VALUE.

¶¶ 34–41 (COURT HELD TRIAL COURT CORRECTLY RULED THIS EVIDENCE WAS NOT RELEVANT AND THAT ITS PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE).

STATE V. JEAN, 239 ARIZ. 495, 372 P.3D 1019 (CT. APP. 2016). [PR. PENDING]

OFFICERS STOPPED TRUCK THAT OWNER WAS DRIVING; JEAN WAS IN SLEEPER BERTH AND CLAIMED HE WAS SIMPLY DRIVER-IN-TRAINING; SEARCH OF TRUCK REVEALED 2,140 POUNDS OF MARIJUANA; JEAN CONTENDED TRIAL COURT ERRED WHEN IT ADMITTED 1999 INCIDENT WHEN MISSOURI HP OFFICER STOPPED TRUCK, FOUND THREE PEOPLE IN TRUCK AND JEAN IN SLEEPER BERTH, ONE OF THE OTHERS CLAIMED TO BE DRIVER-IN-TRAINING, AND 1774 POUNDS OF MARIJUANA WAS IN TRUCK.

- **RULE 404(B).** OTHER CRIMES, WRONGS, OR ACTS.
- **404.B.CR.240** EXTRINSIC EVIDENCE OF ANOTHER CRIME, WRONG, OR ACT IS ADMISSIBLE IF IT IS RELEVANT TO SHOW KNOWLEDGE.

JEAN CONTINUED

- **404.B.CR.500** EVIDENCE OF ANOTHER CRIME, WRONG, OR ACT IS ADMISSIBLE IF IT IS FACTUALLY OR CONDITIONALLY RELEVANT, WHICH MEANS THE PROPONENT IS ABLE TO PRODUCE SUFFICIENT EVIDENCE FROM WHICH THE TRIER-OF-FACT COULD CONCLUDE, BY CLEAR AND CONVINCING EVIDENCE, THAT THE OTHER ACT HAPPENED, THE PERSON COMMITTED THE ACT, AND THE CIRCUMSTANCES OF THAT ACT WERE AS THE PROPONENT CLAIMS; PROOF BEYOND A REASONABLE DOUBT IS NOT NECESSARY.

¶¶ 4–10 (CT. APP. 2016) (COURT HELD TRIAL COURT DID NOT ERR IN ADMITTING THIS OTHER ACT EVIDENCE TO SHOW KNOWLEDGE).

RASOR V. NORTHWEST HOSP. LLC, 239 ARIZ. 546, 373 P.3D 563 (CT. APP. 2016). (PR PENDING.)

RASOR CONTENDED ICU NURSE PROVIDED DEFICIENT CARE IN FAILING TO TAKE STEPS TO MINIMIZE BED PRESSURE AND IN FAILING TO TIMELY DISCOVER PRESSURE ULCER, AND REQUESTED PATIENT RECORDS OF ALL ICU PATIENTS WHO HAD DEVELOPED PRESSURE ULCERS IN 4 YEARS PRECEDING PLAINTIFF'S INJURY.

- **RULE 406**. HABIT; ROUTINE PRACTICE.
- **406.010** HABIT DESCRIBES A PERSON'S REGULAR OR SEMI-AUTOMATIC RESPONSE TO A REPEATED SPECIFIC SITUATION, WHILE CHARACTER REFERS TO A GENERALIZED DESCRIPTION OF A PERSON'S DISPOSITION.

¶¶ 29–36 (COURT HELD PATIENT RECORDS COULD BE RELEVANT FOR DISCOVERY PURPOSES BASED ON PLAINTIFF'S CONTENTION THAT HOSPITAL STAFF HAD HABIT OR ROUTINE OF NOT FOLLOWING HOSPITAL'S REPOSITIONING PROCEDURES).

MURRAY V. MURRAY, 239 ARIZ. 174, 367 P.3D 78 (CT. APP. 2016).

IN A DISPUTE OVER PARENTING TIME, MOTHER OFFERED FATHER'S OUT-OF-COURT E-MAILS AND TEXT MESSAGES MADE IN CONNECTION WITH AN AGREEMENT TO ALLOW HER TO MOVE THE CHILDREN OUT-OF-STATE.

- **RULE 408**. COMPROMISE AND OFFERS AND NEGOTIATIONS.
- **408.010** ALTHOUGH EVIDENCE OF AN OFFER TO COMPROMISE IS NOT ADMISSIBLE TO PROVE OR DISPROVE THE VALIDITY OR AMOUNT OF A DISPUTED CLAIM OR TO IMPEACH BY A PRIOR INCONSISTENT STATEMENT OR A CONTRADICTION, SUCH EVIDENCE IS ADMISSIBLE IF RELEVANT TO SOME OTHER ISSUE IN THE LITIGATION.

¶¶ 14–16 (COURT HELD NOTHING IN THIS RULE BARS EVIDENCE OFFERED TO PROVE A SETTLEMENT RESOLVING A CLAIM, THUS TRIAL COURT ERRED IN NOT CONSIDERING THOSE STATEMENTS).

STATE V. GILL, 240 ARIZ. 229, 377 P.3D 1024 (CT. APP. 2016). (PR PENDING.)

WHEN GILL FAILED TO COMPLETE TASC PROGRAM, STATE SOUGHT TO ADMIT STATEMENTS GILL MADE IN "STATEMENT OF FACTS" FORM GILL WAS REQUIRED TO MAKE FOR ENTRY INTO TASC PROGRAM; GILL CONTENDED THESE WERE STATEMENTS MADE IN CONNECTION WITH A PLEA AGREEMENT.

- **RULE 410**. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.
- **410.070** A STATEMENT OF FACT FORM EXECUTED IN ORDER TO PARTICIPATE IN A TASC PROGRAM IS NOT A STATEMENT IN CONNECTION WITH A PLEA AGREEMENT, AND THUS IS NOT PRECLUDED BY THIS RULE.

¶¶ 2–9 (CT. APP. 2016) (COURT HELD (1) GILL DID NOT PROVIDE THESE STATEMENTS DURING PLEA DISCUSSIONS; (2) GILL DID NOT PROVIDE THESE STATEMENTS TO THE PROSECUTING ATTORNEY; AND (3) GILL WAIVED ANY PROTECTION UNDER THIS RULE WHEN HE WAIVED HIS MIRANDA RIGHTS).

RULE 501. PRIVILEGES.

- **PHYSICIAN-PATIENT.**
- **REPORTER-SOURCE.**
- **WAIVER BY STATUTE.**

AMERICAN POWER PROD. V. CSK AUTO, 239 ARIZ. 151, 367 P.3D 55 (2016). *AMERICAN POWER PROD. V. CSK AUTO*, 235 ARIZ. 509, 334 P.3D 199 (CT APP. 2014).

ON BREACH OF CONTRACT AND NEGLIGENT MISREPRESENTATION CLAIM, TRIAL LASTED 12 TRIAL DAYS AND INCLUDED 24 WITNESSES AND 164 EXHIBITS; ON FRIDAY AFTERNOON BEFORE 3-DAY WEEKEND, JURORS RECEIVED CASE AT ABOUT 2:15; JUROR'S AFFIDAVIT STATED THAT BAILIFF HAD ENTERED JURY ROOM, SOMEONE ASKED HER HOW LONG DELIBERATIONS TYPICALLY LASTED, AND SHE TOLD THEM AN HOUR OR TWO SHOULD BE PLENTY; JURORS RETURNED VERDICT AT 4:13

- **RULE 606(B).** JUROR'S COMPETENCY AS A WITNESS — INQUIRY INTO VALIDITY OF VERDICT IN CIVIL ACTION.
- **606.B.010** TRIAL COURT MAY CONSIDER AN AFFIDAVIT THAT ALLEGES (A) EXTRANEOUS PREJUDICIAL INFORMATION WAS IMPROPERLY BROUGHT TO JURORS' ATTENTION; (B) AN OUTSIDE INFLUENCE WAS IMPROPERLY BROUGHT TO BEAR ON ANY JUROR; OR (C) A MISTAKE WAS MADE IN ENTERING THE VERDICT ON THE VERDICT FORM.

STATE EX REL. MONTGOMERY V. PADILLA (SIMCOX), 239 ARIZ. 314, 371 P.3D 642(CT. APP. 2016).

STATE CONTENDED TRIAL COURT ERRED IN "CONCLUDING ANY RESTRICTION OF [DEFENDANT'S] RIGHT TO PERSONALLY CROSS-EXAMINE WITNESS WOULD BE 'A VIOLATION OF CONSTITUTIONAL PROPORTION' AND REVERSIBLE ERROR."

- **RULE 611(B).** MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE — SCOPE OF CROSS-EXAMINATION.
- **611.B.045** A DEFENDANT WHO HAS BEEN ALLOWED SELF-REPRESENTATION HAS THE RIGHT TO CROSS-EXAMINE THE WITNESSES PERSONALLY, AND THIS RIGHT MAY BE ABROGATED ONLY IF THE STATE MAKES A SHOWING BY CLEAR AND CONVINCING EVIDENCE THAT SUCH CROSS-EXAMINATION WILL INJURE THE PHYSICAL OR PSYCHOLOGICAL WELL-BEING OF THE WITNESS.

¶ 13 (COURT REMANDED SO TRIAL COURT COULD DETERMINE WHETHER STATE PRESENTED CLEAR AND CONVINCING EVIDENCE OF INDIVIDUALIZED AND CASE-SPECIFIC NEED FOR ACCOMMODATION FOR EACH MINOR VICTIM WITNESS).

SPRING V. BRADFORD, 241 ARIZ. 455, 388 P.3D 849 (CT. APP. 2017).

TRIAL COURT ORDERED RULE OF EXCLUSION OF WITNESSES IN EFFECT; PLAINTIFF CONTENDED DEFENDANT'S ATTORNEY VIOLATED RULE BY PROVIDING EXPERT WITNESSES WITH TRANSCRIPTS OF PLAINTIFF'S EXPERT WITNESSES' TESTIMONY.

- **RULE 615**. EXCLUDING WITNESSES.
- **615.010** SEQUESTRATION OF WITNESSES IS MANDATORY WHEN REQUESTED IN BOTH CIVIL AND CRIMINAL CASES.
- **615.060** THIS RULE DOES NOT AUTOMATICALLY EXEMPT AN EXPERT WITNESS FROM EXCLUSION. @ ¶ 13.

SPRING CONTINUED

- **615.070** EVEN THOUGH THE TRIAL COURT HAS INVOKED THE RULE EXCLUDING A WITNESS, THE TRIAL COURT MAY ALLOW AN EXPERT WITNESS TO REVIEW TRANSCRIBED TESTIMONY IN ORDER TO PREPARE TO TESTIFY.
- **615.080** BEFORE A TRIAL COURT MAY IMPOSE SANCTIONS FOR A VIOLATION OF THIS RULE, THE MOVING PARTY MUST SHOW THAT THE WITNESS DID IN FACT VIOLATE THE RULE AND THAT THE WITNESS'S CONDUCT PREJUDICED THE PARTY.

¶¶ 10–24 (TRIAL COURT NOTED THAT, HAD COUNSEL SOUGHT PERMISSION, IT LIKELY WOULD HAVE ALLOWED BOTH SIDES' EXPERTS TO REVIEW OR OBSERVE TRIAL TESTIMONY; COURT CONCLUDED TRIAL COURT'S ACTION OF PROVIDING INSTRUCTIONS TO JURORS WAS SUFFICIENT TO CORRECT ANY ERROR).

ISHAK V. MCCLENNEN, 241 ARIZ. 364, 388 P.3D 1 (CT. APP. 2016).

TRIAL COURT PRECLUDED EVIDENCE THAT ISHAK WAS A MEDICAL MARIJUANA CARDHOLDER; STATE'S EXPERT TESTIFIED THAT ISHAK HAD 26.9 NG/ML OF THC IN HIS BLOOD; TRIAL COURT PRECLUDED EXPERT FROM TESTIFYING WHETHER THAT LEVEL "CAUSES IMPAIRMENT IN THE PERSON"; ISHAK'S EXPERT TESTIFIED THERE "IS NO CONSENSUS" ABOUT THE CONCENTRATION OF THC THAT CAUSES IMPAIRMENT; JURORS ACQUITTED ISHAK OF THE (A)(1) CHARGE, BUT CONVICTED HIM OF THE (A)(3) CHARGE.

- **RULE 701**. OPINION TESTIMONY BY LAY WITNESSES.
- **701.020** A WITNESS WHO IS NOT TESTIFYING AS AN EXPERT MAY GIVE TESTIMONY IN THE FORM OF AN OPINION IF THE OPINION IS LIMITED TO ONE THAT IS (A) RATIONALLY BASED ON THE WITNESS'S PERCEPTION, (B) HELPFUL TO CLEARLY UNDERSTANDING THE WITNESS'S TESTIMONY OR TO DETERMINING A FACT IN ISSUE, AND (C) NOT BASED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WITHIN THE SCOPE OF RULE 702.

¶ 18 ALTHOUGH STATE'S EXPERT TESTIFIED SAMPLE OF ISHAK'S BLOOD SHOWED 26.9 NG/ML OF THC, COURT HELD LAY PERSON (INCLUDING ISHAK) COULD GIVE OPINION THAT DEFENDANT WAS NOT IMPAIRED BY MARIJUANA.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

A WITNESS WHO IS QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION MAY TESTIFY IN THE FORM OF AN OPINION OR OTHERWISE IF:

(A) THE EXPERT'S SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE;

(B) THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) A WITNESS WHO IS **QUALIFIED** AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION MAY TESTIFY IN THE FORM OF AN OPINION OR OTHERWISE IF:

(A) THE EXPERT'S SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE;

(B) THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**

(A) THE EXPERT'S SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE;

(B) THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

Q) QUALIFIED

(A) THE EXPERT'S SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL **ASSIST** THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE;

(B) THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**

(A) **ASSIST**

(B) THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**

(A) **ASSIST**

(B) THE TESTIMONY IS **BASED** ON SUFFICIENT FACTS OR DATA;

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**

(A) **ASSIST**

(B) **BASED**

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**

(A) **ASSIST**

(B) **BASED**

(C) THE TESTIMONY IS THE PRODUCT OF RELIABLE PRIN**C**IPLES AND METHODS; AND

(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**
(A) **ASSIST**
(B) **BASED**
(C) PRIN**C**IPLES AND METHODS
(D) THE EXPERT HAS RELIABLY APPLIED THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**
(A) **ASSIST**
(B) **BASED**
(C) PRIN**C**IPLES AND METHODS
(D) THE EXPERT HAS RELIABLY APPLI**ED** THE PRINCIPLES AND METHODS TO THE FACTS OF THE CASE.

RULE 702. TESTIMONY BY EXPERT WITNESSES.

(Q) **QUALIFIED**
(A) **ASSIST**
(B) **BASED**
(C) PRIN**C**IPLES
(D) APPLI**ED**

STATE V. ROMERO, 239 ARIZ. 6, 365 P.3D 358 (2016).

ROMERO CONTENDED TRIAL COURT ERRED IN RULING THAT THE WITNESS WHOSE EXPERTISE WAS IN EXPERIMENTAL DESIGN WAS NOT QUALIFIED TO GIVE OPINION ON FIELD OF FIREARM IDENTIFICATION.

- **RULE 702(Q).** THE WITNESS MUST BE QUALIFIED.
- **702.010** A WITNESS MAY BE QUALIFIED AS AN EXPERT BY TRAINING OR EDUCATION.
- **702.020** A WITNESS MAY BE QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, OR EXPERIENCE.

¶¶ 13–16 (COURT CONCLUDED TRIAL COURT ABUSED DISCRETION AND REMANDED FOR DETERMINATION WHETHER ERROR WAS HARMLESS).

***STATE V. ROMERO*, 240 ARIZ. 504, 381 P.3D 297, ¶¶ 4–22 (CT. APP. 2016)** (UPON REMAND, COURT CONCLUDED ERROR IN PRECLUDING EXPERT WITNESS TESTIMONY WAS NOT HARMLESS).

STATE V. HASKIE, 240 ARIZ. 270, 378 P.3D 446 (CT. APP. 2016). (PR PENDING.)

OFFICER FOUND FEMALE VICTIM WITH VARIOUS BRUISES AND ABRASIONS; PRIOR TO TRIAL, VICTIM DENIED THAT HASKIE HAD ASSAULTED HER; STATE'S EXPERT WITNESS ON DOMESTIC VIOLENCE TESTIFIED AS "COLD" EXPERT; HASKIE CONTENDED WITNESS WENT BEYOND WHAT IS PERMISSIBLE WHEN SHE TESTIFIED THAT "IT'S VERY RARE" FOR THE VICTIM TO GIVE A FALSE REPORT AND MORE COMMON TO MINIMIZE OR DENY WHAT HAD HAPPENED.

- **RULE 702(A).** ASSIST TRIER OF FACT.
- **702.A.040** AN EXPERT MAY TESTIFY ABOUT BEHAVIORAL CHARACTERISTICS OF CERTAIN CLASSES OF PERSONS, BUT MAY NOT GIVE AN OPINION ABOUT THE ACCURACY, RELIABILITY, OR TRUTHFULNESS OF A PARTICULAR PERSON, OR QUANTIFY THE PERCENTAGE OF SUCH PERSONS WHO ARE TRUTHFUL.

¶¶ 15–33 (COURT CONCLUDED THE WITNESS DID GO BEYOND WHAT IS PERMISSIBLE, BUT TO EXTENT THAT TESTIMONY WAS NOT PERMISSIBLE, ANY ERROR WAS HARMLESS).

STATE V. FOSHAY, 239 ARIZ. 271, 370 P.3D 618 (CT. APP. 2016).

FOSHAY CONTENDED TRIAL COURT ERRED IN ALLOWING STATE'S EXPERT TO TESTIFY BASED IN PART ON THE USE OF 3–D IMAGING SOFTWARE AND "CONFOCAL MICROSCOPIC ANALYSIS."

- **RULE 702(Q)**. THE WITNESS MUST BE QUALIFIED.

¶¶ 9–12 (WITNESS'S TESTIMONY SHOWED WORKING KNOWLEDGE OF HOW 3–D CONFOCAL MICROSCOPY FUNCTIONED, AND ALTHOUGH HE DID NOT HAVE PERSONAL KNOWLEDGE HOW MAPPING SOFTWARE FUNCTIONED, THAT DID NOT AFFECT HIS KNOWLEDGE AND EXPERIENCE WITH THE PROCESS).

FOSHAY CONTINUED

FOSHAY CONTENDED THE TESTIMONY WAS NOT BASED ON RELIABLE PRINCIPLES AND METHODS.

- **RULE 702(C).** RELIABLE PRINCIPLES AND METHODS.
- **702.C.011 — 702.C.015** DAUBERT IDENTIFIED FIVE NON-EXCLUSIVE FACTORS FOR COURTS TO CONSIDER IN DETERMINING WHETHER SCIENTIFIC EVIDENCE IS RELIABLE: (1) WHETHER THE SCIENTIFIC METHODOLOGY HAS BEEN TESTED; (2) WHETHER THE METHODOLOGY HAS BEEN SUBJECTED TO PEER REVIEW; (3) THE KNOWN OR POTENTIAL RATE OF ERROR WHEN APPLIED; (4) WHETHER THE METHODOLOGY HAS GENERAL ACCEPTANCE WITHIN THE RELEVANT SCIENTIFIC COMMUNITY (OLD FRYE TEST); AND (5) THE EXISTENCE AND MAINTENANCE OF STANDARDS CONTROLLING THE TECHNIQUE'S OPERATION.

¶ 13 (WITNESS'S TESTIMONY SHOWED 3–D CONFOCAL MICROSCOPY METHODOLOGY WAS (1) TESTABLE, (2) SUBJECTED TO PEER REVIEW, (3) STUDIED SUFFICIENTLY TO ESTABLISH KNOWN OR POTENTIAL RATES OF ERROR, AND (4) GENERALLY ACCEPTED WITHIN RELEVANT SCIENTIFIC COMMUNITY).

FOSHAY CONTINUED

FOSHAY CONTENDED ADMISSION OF TESTING REPORT PREPARED BY ANOTHER EXPERT VIOLATED HIS RIGHTS UNDER THE CONFRONTATION CLAUSE.

- **RULE 801**. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY.
- **801.010** ADMISSION OF AN OUT-OF-COURT STATEMENT THAT IS NON-HEARSAY IS NOT "TESTIMONIAL EVIDENCE" AND DOES NOT VIOLATE THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

FOSHAY CONTINUED

- **RULE 801(C).** HEARSAY.
- **801.C.010** HEARSAY IS AN ORAL, WRITTEN, OR NON-VERBAL ASSERTION, OTHER THAN ONE MADE BY THE DECLARANT WHILE TESTIFYING AT THE TRIAL OR HEARING, OFFERED IN EVIDENCE TO PROVE THE TRUTH OF THE MATTER ASSERTED.
- **801.C.030** IF THE OUT-OF-COURT ASSERTION IS ADMITTED FOR A PURPOSE OTHER THAN TO PROVE THE TRUTH OF THE MATTER ASSERTED, THEN ITS ADMISSION DOES NOT VIOLATE THE RIGHT OF CONFRONTATION.

¶¶ 26–33 (COURT HELD TESTING REPORT WAS OFFERED TO SHOW BASIS OF EXPERT'S OPINION, THUS IT WAS NOT HEARSAY AND DID NOT VIOLATE CONFRONTATION CLAUSE).

STATE V. GOUDEAU, 239 ARIZ. 421, 372 P.3D 945 (2016).

GOUDEAU CONTENDED THE TRIAL COURT ERRED BY ALLOWING THE EXPERT TO TESTIFY THAT, AS PART OF "SECOND CHAIR PROCESS," ANOTHER UNIDENTIFIED PPD FIREARMS EXAMINER "AGREED WITH HIS IDENTIFICATION."

- **RULE 703**. BASES OF AN EXPERT'S OPINION TESTIMONY.
- **703.110** ALTHOUGH AN EXPERT WITNESS IS ALLOWED TO DISCLOSE FACTS OR DATA NOT ADMISSIBLE IN EVIDENCE IF THEY ARE OF THE TYPE UPON WHICH EXPERTS REASONABLY RELY, THE EXPERT SHOULD NOT BE ALLOWED TO ACT MERELY AS A CONDUIT FOR THE OTHER EXPERT'S OPINION AND THUS CIRCUMVENT THE REQUIREMENTS EXCLUDING CERTAIN TYPES OF HEARSAY STATEMENTS.

GOUDEAU CONTINUED

- **RULE 801(C).** HEARSAY.
- **801.C.030** IF THE OUT-OF-COURT ASSERTION IS ADMITTED FOR A PURPOSE OTHER THAN TO PROVE THE TRUTH OF THE MATTER ASSERTED, THEN ITS ADMISSION DOES NOT VIOLATE THE RIGHT OF CONFRONTATION.
- **801.C.035** IF AN EXPERT WITNESS DISCLOSES THE FACTS OR DATA ONLY FOR THE LIMITED PURPOSE OF DISCLOSING THE BASIS OF THE OPINION, THEY ARE NOT SUBSTANTIVE EVIDENCE AND ADMISSION OF THOSE FACTS AND DATA DOES NOT VIOLATE THE RIGHT OF CONFRONTATION, AND BECAUSE THEY ARE NOT ADMITTED TO PROVE THE TRUTH OF THE MATTER ASSERTED, THEY ARE NOT HEARSAY.

¶¶ 147–49 (COURT HELD EXPERT DID NOT ACT AS MERE "CONDUIT" FOR OTHER EXAMINER'S OPINION, AND IT WAS INSTEAD PART OF VERIFICATION PROCESS PPD CRIME LABORATORY GENERALLY FOLLOWED IN THIS TYPE OF CASE).

STATE V. INGRAM, 239 ARIZ. 228, 368 P.3D 936 (CT. APP. 2016).

OFFICER TESTIFIED PERSONNEL AT U.S. MARSHALS SERVICE SAID INGRAM WAS POSSIBLY ARMED WITH .40 CALIBER PISTOL; INGRAM CONTENDED THIS WAS HEARSAY.

- **RULE 802**. THE RULE AGAINST HEARSAY.
- **802.030** IF HEARSAY EVIDENCE IS ADMITTED WITHOUT OBJECTION, IT BECOMES COMPETENT EVIDENCE ADMISSIBLE FOR ALL PURPOSES, UNLESS ITS ADMISSION AMOUNTS TO FUNDAMENTAL ERROR.

¶ 23 N.6 (ALTHOUGH THIS APPEARED TO BE HEARSAY, DEFENDANT OBJECTED ON BASIS OF "FOUNDATION" AND NOT "HEARSAY," AND THUS FAILED TO PRESERVE ISSUE FOR APPEAL).

STATE V. WRIGHT, 239 ARIZ. 284, 370 P.3D 1122 (CT. APP. 2016).

UNDERCOVER OFFICER'S TRUCK HAD ONE-WAY RADIO TRANSMITTER AND DIGITAL AUDIO RECORDER HIDDEN INSIDE IT; OFFICER DESCRIBED ACTIONS OF WRIGHT AND CO-DEFENDANT IN OBTAINING METHAMPHATAMINE; WRIGHT CONTENDED AUDIO RECORDING FROM OFFICER'S TRUCK WAS HEARSAY.

- **RULE 803(1)**. EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS — PRESENT SENSE IMPRESSIONS.
- **803.1.010** A HEARSAY STATEMENT IS ADMISSIBLE AS A PRESENT SENSE IMPRESSION IF (1) THE DECLARANT PERCEIVED THE EVENT OR CONDITION, (2) THE STATEMENT DESCRIBED THE EVENT OR CONDITION, AND (3) THE DECLARANT MADE THE STATEMENT WHILE PERCEIVING THE EVENT OR CONDITION OR IMMEDIATELY THEREAFTER.

¶¶ 12 (COURT HELD AUDIO STATEMENTS IN AUDIO RECORDING WERE PRESENT SENSE IMPRESSIONS).

STATE V. GULLEY, 240 ARIZ. 580, 382 P.3D 795 (CT. APP. 2016). [PR. PENDING]

M.W TESTIFIED ABOUT WHAT S.W. HAD SAID; GULLEY CONTENDED S.W.'S STATEMENTS WERE HEARSAY.

- **RULE 803(2)**. EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS — EXCITED UTTERANCES.
- **803.2.010** THIS RULE HAS THREE REQUIREMENTS: (1) THERE MUST BE A STARTLING EVENT; (2) THE STATEMENT MUST RELATE TO THE STARTLING EVENT; AND (3) THE STATEMENT MUST BE MADE SOON ENOUGH AFTER THE EVENT SO THAT THE DECLARANT DOES NOT HAVE TIME TO FABRICATE.

¶¶ 13–16 (COURT NOTED GULLEY'S ASSAULT ON S.W.'S MOTHER STARTLED S.W., THAT S.W. WAS EXTREMELY TENSE AND HYPER WHEN HE DESCRIBED INCIDENT, AND ONLY 5 TO 10 MINUTES ELAPSED BETWEEN EVENTS AND S.W.'S STATEMENT, THUS TRIAL COURT PROPERLY FOUND S.W.'S STATEMENTS WERE EXCITED UTTERANCES).